



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: LM014Apr19

In the matter between:

Rappa Management (Pty) Ltd

Primary Acquiring Firm

and

Rappa Holdings (Pty) Ltd

Primary Target Firm

Panel	: Andreas Wessels (Presiding Member)
	: Yasmin Carrim (Tribunal Member)
	: Imraan I. Valodia (Tribunal Member)
Heard on	: 10 July 2019
Order Issued on	: 10 July 2019
Reasons Issued on	: 18 September 2019

Reasons for Decision

Conditional Approval

[1] On 10 July 2019, the Competition Tribunal ("Tribunal") conditionally approved the proposed transaction involving Rappa Management (Pty) Ltd ("Rappa Management") and Rappa Holdings (Pty) Ltd ("Rappa Holdings"), hereinafter collectively referred to as the merging parties.

[2] The reasons for the conditional approval of the proposed transaction follow.

Parties to the proposed transaction

Primary acquiring firm

[3] The primary acquiring firm is Rappa Management, an entity established for purposes of the proposed transaction. The [REDACTED] of Rappa

Management is [REDACTED]. Of relevance to the competition assessment of the proposed transaction are the activities of Aulion Global Trading DMCC ("Aulion"), [REDACTED].

- [4] Aulion is a Dubai-based company incorporated in accordance with the laws of the United Arab Emirates. It trades in precious metals and its services include the sourcing, assaying (purity testing) and refining of precious metals globally.
- [5] In South Africa, Aulion procures gold doré bars¹ from (only) Rappa Resources (Pty) Ltd ("Rappa Resources"), a subsidiary of the target firm. Aulion then refines these gold doré bars from its Dubai base into hallmark/minted gold bars.² It sells the hallmark gold bars in the global market.

Primary target firm

- [6] The primary target firm is Rappa Holdings, a private company incorporated in accordance with the laws of South Africa. Rappa Holdings is currently controlled by the Rynic Trust. Rappa Holdings directly or indirectly controls a number of firms including the abovementioned Rappa Resources. Rappa Holdings and all the firms directly and indirectly controlled by it are hereinafter collectively referred to as the "Target Group".
- [7] The Target Group, through Rappa Resources, produces and supplies gold doré bars with a purity level of up to 95%. Rappa Resources supplies these gold doré bars to customers such as Aulion who further refines or beneficiates the gold doré bars into hallmarked products. Rappa Resources does not currently have the required certificate and ability to produce hallmark gold bars.

¹ A gold doré is a semi-pure alloy of gold created from secondary gold (predominantly scrap jewellery). It requires further refining as it is not pure gold. It is ultimately used as an input in hallmark/minted gold bars.

² A hallmark/minted gold bar is a gold bar with a purity level of 99.5% or higher, made by a refinery that is specially accredited to mark it as hallmark/minted. These bars are used as international investments and trading commodities.

Proposed transaction

- [8] In terms of the *Sale of Shares Agreement*, Rappa Management will acquire 100% of the issued share capital in Rappa Holdings. Rappa Management will therefore control Rappa Holdings post-merger.

Impact on competition and public interest considerations

- [9] The Competition Commission ("Commission") considered the activities of the merging parties and found no horizontal overlap. However, the proposed transaction results in a vertical overlap since Aulion procures gold doré bars from Rappa Resources for further refinement and the production of hallmark bars.
- [10] The Commission did not conclude on the exact relevant markets, but assessed the effects of the proposed transaction in the following markets: (i) an upstream national market for the production and supply of gold doré bars; and (ii) a downstream international market for the production and supply of hallmark or minted gold bars.
- [11] The Commission found that Rappa Resources has a market share of between [40-50]% in the upstream market for the production and supply of gold doré bars in South Africa.
- [12] In relation to potential customer foreclosure, the Commission noted that Aulion has a contract arrangement with Rappa Resources in terms of which Aulion purchases gold doré bars in South Africa only from Rappa Resources. In other words, Aulion currently does not buy gold doré bars from any other producer in South Africa other than Rappa Resources. The Commission further found that other South African suppliers of gold doré bars can supply their gold doré bars to other customers such as Rand Refinery in South Africa and other refineries located outside of South Africa.
- [13] The Commission in its report furthermore noted that Rappa Resources since 2014 has not supplied gold doré bars to refineries located in South Africa.

However, the Commission received concerns that the proposed transaction will result in gold doré bars being exported out of South Africa without being beneficiated locally. It was submitted that the South African refining industry has not beneficiated gold doré bars to higher purity levels since it has exported its doré bars and that this has resulted in a considerable loss of income to South Africa because of the lack of local beneficiation. The complainant was that the proposed merger will further exacerbate the practice of exporting gold doré bars to be further refined or beneficiated, in this case in Dubai.

- [14] The merging parties submitted that according to the Precious Metals Act ("PMA"), the export of unwrought precious metals (which includes gold doré bars)³ is only prohibited if a person does not have the requisite approval in terms of section 12(1) of the PMA⁴. Rappa Resources received an export approval from the South African Diamond and Precious Metal Regulator (SADPMR) on 02 November 2018.
- [15] The Commission ultimately recommended the conditional approval of the proposed transaction because it was of the view that post-merger Rappa Resources might refuse to supply local refineries with gold doré bars since Rappa Resources will be controlled by Rappa Management. The Commission noted that a Dubai based company that forms part of the Rappa Management group of companies purchases gold doré bars and further refines them up to a purity level of 99.99% in competition with the local refineries. As such the Commission found that the proposed merger was likely to negatively affect the local refining of gold in South Africa as a substantial amount of the gold doré bars produced in South Africa will likely be exported.
- [16] The merging parties disagreed with the Commission's abovementioned view but, nevertheless, to address the Commission's concern agreed to the

³ The definition of unwrought precious metals includes precious metal that is unrefined or has been refined to a purity less than 99,9% and has not undergone any manufacturing process other than being refined or formed into a bar (but not a minted bar).

⁴ S12(1) of the PMA, 37 of 2005 states: No person may export any unwrought or semi-fabricated gold except with the approval of the National Treasury in terms of the Exchange Control Regulations made under the Currency and Exchanges Act, 1933 (Act No.9 of 1933), granted with the 45 concurrence of the Minister.

proposed transaction being approved subject to the following supply condition in relation to gold doré bars:

"Rappa Resources shall not refuse to supply Gold Doré Bars to a Local Refinery, provided that:

3.1.1. the terms and conditions of supply offered by the relevant Local Refinery are not less favourable to Rappa Resources than the terms and conditions on which Rappa Resources supplies Gold Doré Bars to any one of its export customers; and

3.1.2. the relevant Local Refinery is registered as an approved manufacturer of minted bars ...".

- [17] The Commission recommended that the above condition be placed on the approval of the proposed transaction. However, the Tribunal at the hearing raised various concerns regarding the formulation / potential interpretation of the abovementioned proposed supply condition and questioned if the condition as formulated would have the desired effect.⁵ More specifically, the reference in the condition to *"any one of its [Rappa Resources'] export customers"* (emphasis added), which would include the vertically integrated Aulion⁶, raised concerns. The Tribunal was furthermore concerned that Rappa Resources might charge the local refineries certain exported-related costs that would not be incurred if Rappa Resources sold its gold doré bars to local refineries in South Africa.

- [18] In response to the concerns raised by the Tribunal, the merging parties reformulated the tendered local supply condition of gold doré bars as follows:

"2.1 Rappa Resources shall not refuse to supply Gold Doré Bars to a Local Refinery, provided that:

2.1.1 the terms and conditions of supply offered by the relevant Local Refinery are similar to the terms and conditions offered to Rappa Resources by its export customers other than Aulion;

2.1.2 the price, net of carriage, insurance and freight ("CIF"), offered by the relevant Local Refinery shall be not less than the average price offered to

⁵ Transcript, pages 16 to 26.

⁶ Given the formulation of the original proposed remedy, Rappa Resources hypothetically could ask (the vertically integrated) Aulion a high price for gold doré bars and in that way raise local rivals' costs.

Rappa Resources by its export customers other than Aulion, over the preceding twelve months period;

2.1.3 the relevant Local Refinery is registered as an approved manufacturer of minted bars, in accordance with regulation 27B of the Precious Metals Regulations published under GN R570 in Government Gazette 30061 of 9 July 2007, as amended from time to time; and

2.1.4 Rappa Resources shall furnish to each Local Refinery who approaches Rappa Resources for the purchase of Gold Doré Bars and to whom Rappa Resources have not previously sold Gold Doré Bars a copy of the Conditions in clause 2.1."

- [19] Furthermore, the merging parties tended enhanced monitoring and compliance conditions.
- [20] The merging parties' amended conditions addressed the Tribunal's concerns and were imposed as conditions.
- [21] In relation to employment effects, the merging parties submitted that the proposed transaction will not have any negative effects on employment in South Africa.⁷ Other than the issue of local beneficiation discussed above, the proposed transaction raises no other public interest concerns.

Restraint of Trade

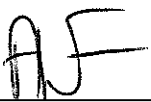
- [22] The Commission noted a non-compete clause set out in section 11 of the *Sale of Shares Agreement* entered into between Rappa Management and Rappa Holdings. The restraint states: "*The seller undertakes in favour of the Purchaser and the Group Companies that for a period of 5 (five) years, after the Signature date, it shall not: directly or indirectly ... carry on or be involved in ... Any business or concern which carries on a business in the Republic of South Africa which is substantially similar to the Business and which could reasonably be regarded as competing with any of the Group Companies*" (emphasis added).

⁷ Merger Record, pages 11 and 68.

- [23] The Commission's report recorded its view that the duration of the restraint was reasonable to protect the acquiring group's investment, but it was unclear what the Commission's position was regarding the scope of the restraint in terms of the range of activities that it would apply to.
- [24] The Tribunal raised concerns regarding the scope and duration of the restraint.⁸ The merging parties in response agreed to alter the restraint by reducing the restraint period from the original five years to four years and furthermore limited the scope of the restraint to "*any business or concern which carries on a business as a refiner of and/or trader in gold and other precious metals in the Republic of South Africa*" (see paragraph 2.2 of the imposed conditions).
- [25] We consider the altered restraint of trade as reasonable in the context of this case.

Conclusion

- [26] In light of the above, we conclude that the imposed conditions address any potential competition and public interest concerns resulting from the proposed transaction. Accordingly, we approve the proposed transaction with the conditions attached hereto marked as "**Annexure A**".



Mr A W Wessels

18 September 2019
DATE

Ms Yasmin Carrim and Prof. Imraan I. Valodia concurring

Case Manager: Peter Kumbirai and Hlumelo Vazi
For the merging parties: J Roodt and N Coetzer of Roodt Inc. Attorneys
For the Commission: R Ncheche and T Mahlangu *

⁸ Transcript, pages 4 to 12 and 26.

Annexure A

Rappa Management (Pty) Ltd

and

Rappa Holdings (Pty) Ltd

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CONDITIONS

1. Definitions

The following expressions shall bear the meanings assigned to them below and cognate expressions bear corresponding meanings –

- 1.1. **"Agreement"** means the sale of shares agreement concluded between Rappa Management and the Rynic Trust on or about 28 February 2019;
- 1.2. **"Approval Date"** means the date referred to on the Tribunal's merger clearance certificate (Form CT10);
- 1.3. **"Commission"** means the Competition Commission of South Africa;
- 1.4. **"Commission Rules"** means the Rules for the Conduct of Proceedings in the Commission;
- 1.5. **"Competition Act"** means the Competition Act 89 of 1998, as amended;
- 1.6. **"Conditions"** means these conditions;
- 1.7. **"Days"** means any calendar day which is not a Saturday, Sunday or an official holiday in South Africa;
- 1.8. **"Gold Doré Bars"** means gold bars which are refined by Rappa Resources to a purity level between 70% to 99%;
- 1.9. **"Implementation Date"** means the date, occurring after the Approval Date, on which the merger is implemented by the Merging Parties;
- 1.10. **"Local Refiners"** means all current and/or future refiners of Gold Doré Bars who have operations in South Africa and who refine Gold Doré Bars to purity levels of at least 99.99% and can refine Gold Doré Bars in compliance with the London Bullion Market Association (LBMA) Good Delivery Rules, and "Local Refinery" shall have a corresponding meaning;
- 1.11. **"Merging Parties"** means Rappa Management and Rappa Holdings;
- 1.12. **"Merger"** means the acquisition of the entire issued share capital of Rappa Holdings by Rappa Management;

1.13. **"Rappa Holdings"** means Rappa Holdings Proprietary Limited;

1.14. **"Rappa Management"** means Rappa Management Proprietary Limited; and

1.15. **"Rappa Resources"** means Rappa Resources Proprietary Limited, a subsidiary of Rappa Holdings.

2. Conditions to the approval of the merger

2.1. Rappa Resources shall not refuse to supply Gold Doré Bars to a Local Refinery, provided that:

2.1.1. the terms and conditions of supply offered by the relevant Local Refinery are similar to the terms and conditions offered to Rappa Resources by its export customers other than Aulion;

2.1.2. the price, net of carriage, insurance and freight ("CIF"), offered by the relevant Local Refinery shall be not less than the average price offered to Rappa Resources by its export customers other than Aulion, over the preceding twelve months period;

2.1.3. the relevant Local Refinery is registered as an approved manufacturer of minted bars, in accordance with regulation 27B of the Precious Metals Regulations published under GN R570 in Government Gazette 30061 of 9 July 2007, as amended from time to time; and

2.1.4. Rappa Resources shall furnish to each Local Refinery who approaches Rappa Resources for the purchase of Gold Doré Bars and to whom Rappa Resources have not previously sold Gold Doré Bars a copy of the Conditions in clause 2.1.

2.2. The parties to the Agreement amend the Agreement by:

2.2.1. deleting the words and numbers "5 (five)" in the second line of clause 11.1 and the replacement thereof with "4 (four)"; and

2.2.2. deleting the hanging paragraph immediately after clause 11.1.1.3 and the replacement thereof with the following paragraph:

"any business or concern which carries on a business as a refiner of and/or trader in gold and other precious metals in the Republic of South Africa;"

3. Monitoring of compliance with the Conditions

- 3.1. The Merging Parties shall inform the Commission of the Implementation Date within 5 (five) Days of it becoming effective.
- 3.2. Rappa Resources shall, within 10 Days of the Approval Date, publish the Conditions in clause 2.1 on their website for a period of one year.
- 3.3. As proof of compliance with 2.1 and 3.2 above, Rappa Resources shall:
 - 3.3.1. within 5 Days of publishing the Conditions, provide the Commission with an affidavit deposed to by a senior official of Rappa Resources attesting to the publication of the Conditions and attach proof of such publication;
 - 3.3.2. on or before each anniversary of the Approval Date, submit a written report to the Commission on compliance by Rappa Resources with the Conditions during the 12 month period ending on the date falling on the last day of the month preceding the Approval Date ("Reporting Period") stating:
 - 3.3.2.1. the identity of the Local Refiners who offered to purchase Gold Doré Bars from Rappa Resources during the Reporting Period, including the prices net of CIF, and terms and conditions offered; and
 - 3.3.2.2. the volumes of Gold Doré Bars sold to export customers other than Aulion during the Reporting Period, including the terms and conditions offered by each of those customers and the average price, net of CIF, at which those sales were concluded.
- 3.4. In the event that the Commission determines that there has been an apparent breach by the Merging Parties of these Conditions, Rule 39 of Commission Rules read together with Rule 37 of the Competition Tribunal Rules will apply.
- 3.5. The Merging Parties and/or the Commission may at any time, on good cause shown, apply to the Tribunal for the Conditions to be lifted, revised or amended.

3.6. All correspondence in relation to these Conditions should be forwarded to mergerconditions@compcom.co.za.